No. 75-37

Supreme Court, U.S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

RAYMOND J. RYAN AND HELEN RYAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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OPINIONS BELOW

The order of the Tax Court (Pet. App. C, pp. 14a-15a) is not reported. The opinion of the court of appeals (Pet. App. B, pp. 2a-13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A, p. la) was entered on May 23, 1975. The petition for a writ of certiorari was filed on July 7, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the interlocutory order of the Tax Court, compelling petitioners to answer interrogatories propounded by the Commissioner of Internal Revenue pursuant to discovery procedures of the Tax Court, is appealable as a "final decision" under 28 U.S.C. 1291.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the Fifth Amendment to the Constitution, Sections 7482 and 7485 of the Internal Revenue Code of 1954, 26 U.S.C. 7482 and 7485, and Section 1291 of the Judicial Code, 28 U.S.C. 1291, are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

This case arises out of deficiency proceedings that are still pending in the United States Tax Court.[1] In connection with those proceedings, on January 18, 1974, the Commissioner of Internal Revenue, pursuant to Rule 71 of the United States Tax Court Rules of Practice and Procedure, served petitioners with written interrogatories and a request for production of documents concerning petitioners' various business transactions and relationships with a certain Swiss bank and another named individual during the years 1958 through 1965. Petitioners objected to the propounded interrogatories, alleging, *inter alia,* that the information and documents requested were irrelevant to the deficiency determinations then awaiting adjudication and were protected from compulsory disclosure by petitioners'

[1]Petitioners initiated the proceedings below in 1969 by filing a petition in the Tax Court for redetermination of deficiencies in income taxes, including fraud penalties, asserted by the Commissioner for the years 1958 through 1965. On October 6, 1971, the Commissioner applied for an order authorizing him to request the deposition of Swiss bank officials, which the Tax Court granted on April 24, 1972. Petitioners filed a notice of appeal, and after the Tax Court denied their motion to stay execution pending the appeal, filed a petition for a writ of mandamus with the court of appeals, seeking a stay of the order pending appeal. In an order entered on January 5, 1973, the court of appeals denied the petition and dismissed the appeal on the ground that the court lacked jurisdiction because the orders were nonappealable and interlocutory, and did not come within any exception for orders separable from, and collateral to, the pending Tax Court litigation. This Court denied petitioners' petition for a writ of certiorari, 412 U.S. 939.

Fifth Amendment privilege against self-incrimination. On May 24, 1974, after a hearing on petitioners' objections, the Tax Court ordered that petitioners answer the interrogatories in writing and under oath. Petitioners filed a notice of appeal from that order on July 3, 1974. On July 26, 1974, petitioners filed a petition for a writ of mandamus with the court of appeals, seeking an order directing the Chief Judge of the Tax Court to vacate the order entered on May 24, 1974. In response to this motion, the government stated that an order had been entered by the United States District Court for the District of Columbia on August 8, 1974, granting petitioners use immunity with respect to the requested information and documents pursuant to 18 U.S.C. 6002 and ordering them to comply with the requests for information.[2] The court of appeals denied the petition for a writ of mandamus on August 21, 1974. Petitioners did not seek review of the denial of their petition.

The court of appeals dismissed the appeal on May 23, 1975, on jurisdictional grounds, holding that the Tax Court's order was a nonappealable interlocutory order.

ARGUMENT

The decision below is correct. There is no conflict of appellate decisions or other reason for further review.

1. The courts of appeals have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Section 7482(a) of the Internal Revenue Code of 1954, 26 U.S.C. 7482(a). With the exception of certain categories of interlocutory decisions concededly not involved here (see Pet. App. B, p. 6a), the

[2]Petitioners have appealed from the use-immunity order, and that appeal is now pending before the United States Court of Appeals for the District of Columbia Circuit, *sub nom. In re Raymond J. Ryan and Helen Ryan*, No. 74-1906.

only district court decisions falling within the statutory jurisdiction of the courts of appeals are "final decisions." 28 U.S.C. 1291. The purpose of this restriction is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results" (*Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546), and thereby avoid the fragmentary and piecemeal review of cases that would otherwise arise from a succession of separate appeals from the various rulings to which a litigation may give rise. See *Cobbledick* v. *United States*, 309 U.S. 323, 324-326.

In *Cogen* v. *United States*, 278 U.S. 211, 223-224, this Court held that an order compelling discovery or testimony is a nonappealable interlocutory decision notwithstanding that a constitutional privilege may have been asserted as grounds for noncompliance with the order. See also *Alexander* v. *United States*, 201 U.S. 117, 121-122; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 328; *United States* v. *Ryan*, 402 U.S. 530, 532.

Petitioners nevertheless contend (Pet. 11-13) that the order of the Tax Court in this case is appealable under the "collateral order" doctrine enunciated in *Cohen* v. *Beneficial Loan Corp.*, *supra*, 337 U.S. at 546, which permits an appeal from interlocutory decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important * * * and too independent of the cause itself [to be denied immediate review]." But that doctrine does not extend to interlocutory discovery orders of the kind involved here. To the contrary, this Court consistently has held, both before and after *Cohen*, that an order compelling testimony over an objection based upon a claim of Fifth Amendment privilege is not appealable, *i.e.*, that the preliminary determination of Fifth Amendment rights that such an order entails is not a final determination of a claim "too important and too independent" to be denied immediate review. See *United States* v. *Ryan*, *supra*; *Cobbledick* v. *United States*, *supra*; *Alexander* v. *United States*, *supra*. Rather, as those

cases hold, the appealable final determination of Fifth Amendment rights in such circumstances comes only with the conviction of contempt, or other final sanction, that might be imposed upon a refusal to comply with the order.

2. Petitioners attempt to distinguish their case from such cases as *Ryan* and *Cobbledick* by claiming (Pet. 6-10) that if they refuse compliance with the Tax Court's discovery order, that court could choose to dismiss their petition, rather than convict them of contempt, and that dismissal would subject them to immediate collection of their assessed tax liability. But such immediate collection would, of course, leave petitioners in no worse position than if they had chosen to litigate their tax liabilities in a district court. As a prerequisite to instituting a refund suit in a district court, petitioners would have been required to pay their assessed tax liabilities in full. *Flora* v. *United States*, 362 U.S. 145. And the district court, like the Tax Court, would be authorized to dismiss the suit upon failure to comply with a discovery order. Rule 37(b)(2), Fed. R. Civ. P. Thus the "irreparable harm" that petitioners allege would follow from dismissal is merely the post-judgment payment of taxes that petitioners would have been required to pay prior to judgment had they originally chosen to sue for a refund in a district court (or the Court of Claims).[3] Such "harm" does not warrant the extraordinary piecemeal review that petitioners seek here.

Moreover, even upon dismissal, petitioners would be able to stay collection of their deficiency pending appeal by filing a bond. See Section 7485 of the Code. The government may prescribe the conditions under which it will subject itself to the judgment of the courts in the collection of its revenues. *Cheatham* v. *United States*, 92 U.S. 85, 88-89. Having provided access to the judicial process prior

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[3]Since the practical consequences would be the same in these circumstances whether petitioners had proceeded in a district court or the Tax Court, the fact that the Tax Court has only recently adopted the discovery rules of the district courts (see Pet. 10-11) does not provide a basis for further review of this case.

to payment of the tax in Tax Court proceedings, Congress has appropriately conditioned stay of collection pending appellate review upon the filing of a bond. The possibility that petitioners may be required to file a bond for a review of any dismissal for failure to comply with discovery orders does not constitute such irreparable harm, or such an intolerable burden on the assertion of their Fifth Amendment privilege, that immediate interlocutory appellate review is warranted. Furthermore, the Tax Court could impose sanctions that would not entail immediate collection or the filing of a bond, such as a conviction for contempt, from which an immediate appeal would lie without any security requirement.

3. Even if petitioners could secure immediate appellate review of the Tax Court's discovery order, they have no basis for opposing that order. Their Fifth Amendment privilege against self-incrimination has been amply safeguarded by the order granting them use immunity pursuant to 18 U.S.C. 6002.[4] Such an order is coextensive with their privilege against self-incrimination and protects them from the direct or derivative use in a criminal prosecution of any testimony or documents produced by them in answer to the propounded interrogatories. *Kastigar* v. *United States*, 406 U.S. 441, 453. Under the circumstances, therefore, petitioners' compliance with the discovery order will not entail any risk of self-incrimination.[5]

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[4]In the court of appeals, the government argued in the alternative that the appeal should be dismissed for mootness because the use-immunity order protected petitioners' Fifth Amendment privilege. The court of appeals did not reach the question of mootness (Pet. App. B, p. 13a).

[5]Petitioners incorrectly contend (Pet. 13-15) that their petition presents issues "directly related" to the question presented in *Kerr* v. *United States District Court for the Northern District of California*, No. 74-1023, certiorari granted, May 27, 1975. The petitioners in *Kerr*, state officials named as defendants in a suit brought by state prison inmates, have been granted review of the denial of their petition, in the court of appeals, for a writ of mandamus directing the district court to rescind its discovery order requiring "production of all personnel records of all parole board members and hearing officers and all contents of all correctional files of any 200 inmates designated by plaintiffs" (Pet. 17). The *Kerr* petitioners contend, *inter alia*, that the court of appeals applied an improper standard in denying mandamus and that "[t]here is a need to delineate uniform standards for when mandamus should be granted to review such [discovery] orders" (*id.* at 20). The determination of that issue will have no bearing on this case, which arises on appeal and not on mandamus. Indeed, it is implicit in the fact that the *Kerr* petitioners proceeded by mandamus rather than by appeal that they recognized that review of an interlocutory discovery order—the kind of order involved here—is not available by appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX

The Fifth Amendment to the Constitution in pertinent part provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

Sections 7482 and 7485 of the Internal Revenue Code of 1954, 26 U.S.C. 7482 and 7485, in pertinent part provide:

> Section 7482(a). The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.
>
> Section 7485(a). Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 7483 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a notice of appeal in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer—
>
> (1) * * * [files] a bond in a sum fixed by the Tax Court not exceeding double the amount of the * * * deficiency * * * .

Section 1291 of the Judicial Code, 28 U.S.C. 1291, provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.